John Edwards Jimenez
NAME

F-06755
PRISON NUMBER

C-6-190; P.O Box 921
CURRENT ADDRESS OR PLACE OF CONFINEMENT

Imperial, CA 92251
CITY, STATE, ZIP CODE

FILED
JUL - 2 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

John Edwards Jimenez,
(FULL NAME OF PETITIONER)

PETITIONER

v.

M. Smelosky acting Cen.
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

______________________,

The Attorney General of the State of California, Additional Respondent.

Civil No 08CV0866 W(POR)
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

FIRST AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: Clerk, Superior Court San Diego County ATTN: Hon. Kerry Wells; 220 W. Broadway; San Diego, CA 92101
2. Date of judgment of conviction: 12-02-2005
3. Trial court case number of the judgment of conviction being challenged: No. SCD187538 DA ABJ811
4. Length of sentence: 11 Years

cv

5. Sentence start date and projected release date: December 12, 2004 to Release date 04-28-2014 (minimum); October 20015 (Maximum Release Date)

6. Offense(s) for which you were convicted or pleaded guilty (all counts): Penal Code Section 211, second degree robbery and Penal Code section 667, subdivisions (b) through (i), and subdivision (a), respectively (prior strike conviction); 211 = 3 Years and Penal Code 667 = 8 Years

7. What was your plea? (CHECK ONE)
   - (a) Not guilty ☒
   - (b) Guilty ☐
   - (c) Nolo contendere ☐

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
   - (a) Jury ☒
   - (b) Judge only ☐

9. Did you testify at the trial?
   ☐ Yes ☒ No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the **California Court of Appeal**?
    ☒ Yes ☐ No

11. If you appealed in the **California Court of Appeal**, answer the following:
    - (a) Result: Denied
    - (b) Date of result (if known):
    - (c) Case number and citation (if known): Court of Appeal No. D047639
    - (d) Names of Judges participating in case (if known)
    - (e) Grounds raised on direct appeal: I. Evidence was insufficient as a matter of law II. The prosecutor engaged in prejudicial misconduct in cross-examination. III The court erred by failing to give proper supplemental instruction in response to a jury's question I.V. The court erred in denying appellant's motion for new trial based upon the newly discovered evidence

12. If you sought further direct review of the decision on appeal by the **California Supreme Court** (e.g., a Petition for Review), please answer the following:
    - (a) Result: Denied, exhausted state remedies
    - (b) Date of result (if known): July 16, 2007 (approximately)
    - (c) Case number and citation (if known): (Super. Ct. No. SCD 187538) D047639
    - (d) Grounds raised: I. Insufficient evidence as a matter of law II. Prosecutor's prejudicial misconduct in cross-examination III The court erred by failing to give proper supplemental instruction IV. The court erred in denying appellant's motion for new trial based upon the newly discovered evidence.

13. If you filed a petition for certiorari in the **United States Supreme Court**, please answer the following with respect to that petition:
   (a) Result: ____________________
   (b) Date of result (if known): ____________________
   (c) Case number and citation (if known): ____________________
   ____
   (d) Grounds raised: ____________________
   ____
   ____
   ____

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Superior Court**?
☐ Yes ☒ No

15. If your answer to #14 was "Yes," give the following information:
   (a) **California Superior Court** Case Number (if known): ____________________
   (b) Nature of proceeding: ____________________
   ____
   (c) Grounds raised: ____________________
   ____
   ____
   ____
   (d) Did you receive an evidentiary hearing on your petition, application or motion?
   ☐ Yes ☐ No
   (e) Result: ____________________
   (f) Date of result (if known): ____________________

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Court of Appeal**?
☐ Yes ☒ No

17. If your answer to #16 was "Yes," give the following information:

(a) **California Court of Appeal** Case Number (if known):________________

(b) Nature of proceeding: ________________

(c) Names of Judges participating in case (if known)________________

(d) Grounds raised: ________________

(e) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☐ No

(f) Result: ________________

(g) Date of result (if known): ________________

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?
☐ Yes ☒ No

19. If your answer to #18 was "Yes," give the following information:

(a) **California Supreme Court** Case Number (if known):________________

(b) Nature of proceeding: ________________

(c) Grounds raised: ________________

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☐ No

(e) Result: ________________

(f) Date of result (if known): ________________

20. If you did ***not*** file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not:

____

____

____

____

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

☒ Yes ☐ No (IF "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? ______________

(i) What was the prior case number? ______________

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☐ Dismissed for procedural reasons?

(iii) Date of decision: ______________

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present ***all*** other grounds to the California Supreme Court before raising them in your federal Petition.

- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.

- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

Question 22 - A, b, c and d

Court's opinion or order

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Stephan M. Kelly, Clerk
JUN 18 2007
Court of Appeal Fourth District

THE PEOPLE, Plaintiff and Respondent, v. JOHN EDWARDS JIMENEZ et al., Defendants and Appellants.	D047639 (Super. Ct. No. SCD 187538)

APPEALS from judgments of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

John Edwards Jimenez and Jose Jimenez[1] appeal their convictions of robbery (Pen. Code,[2] § 211). True findings were made that each had suffered a prior prison enhancement (§ 667, subd. (a)(1)) and each was sentenced to a total term of 11 years.

On appeal, they contend there was insufficient evidence to support the robbery

1 The defendants share the same last names and for the sake of clarity we refer to the defendants by their first names.

2 All statutory references are to the Penal Code unless otherwise specified.

ATTACHMENT A

convictions, the prosecutor engaged in prejudicial misconduct during cross-examination and closing argument, the court's response to the jury's question was inadequate, and their motions for a new trial should have been granted. We affirm the judgments.

FACTS

On December 12, 2004, about 8:00 p.m., John drove slowly by a lone pedestrian, Danny Sanchez, while his passengers, Jose and two juveniles, leaned out of the car's windows and made hand signs of the Logan criminal street gang in Sanchez's direction. John parked the car at the end of the block and waited while Jose and the two juveniles got out of the car and approached Sanchez. When Jose and the juveniles were about 15 feet away from Sanchez, they started repeatedly asking Sanchez, "Where [he] was from," that is, they asked about his gang affiliation, and then told Sanchez, "This is Logan." Sanchez answered he was "from nowhere," meaning he was not affiliated with any gang and told them he lived in the neighborhood. Sanchez lived about a block away.

Jose stood in front of Sanchez while one juvenile went behind Sanchez and the other went to his side. Sanchez was very frightened. Jose started asking to see Sanchez's hat, wallet, and watch. Sanchez told Jose "he wasn't going to get nothing." At one point, Jose tried to reach into the front pouch of Sanchez's sweatshirt to grab a compact disc player but Sanchez pulled away. One of the juveniles warned Sanchez that if he yelled for help, he would shoot him. Sanchez did not see a gun. Jose then punched Sanchez in the face. The juveniles also punched Sanchez. Sanchez tried to cover himself and moved into the street where he hoped he could flag down a passing car for help. Jose and the juveniles were grabbing him, punching him and threatening to kill him.

A van drove by and, although it did not stop to help Sanchez, Jose and the two juveniles ran back to John's car. Almost immediately thereafter, Sanchez was able to flag down a police car. He told the officer he had been mugged and pointed out John's car, which was at a stop sign at the nearby intersection. The police officer told Sanchez to wait while he pursued the car. The officer told him he would send another officer to Sanchez's location. Sanchez noticed his hat and earrings were missing.

The officer, after radioing in the car's license plate number, activated his lights and sirens and stopped the car. He ordered John, Jose and the two juveniles to get out of the car and sit on the curb. John had been driving and Jose had been sitting in the left rear passenger seat. In the rear seat of the car, the police found Sanchez's hat. Sanchez's earrings were not found.

Defense

Jose testified he and the two juveniles visited his friend Carlos and Carlos's mother had made them dinner. Jose called his brother for a ride home and the three of them were standing outside when Sanchez walked by. As Sanchez passed Jose, he bumped Jose's shoulder and made a gesture that Jose interpreted as meaning Sanchez was about to hit him so Jose hit Sanchez first. Jose hit Sanchez more than twice. He did not ask Sanchez about his watch, hat, wallet, or compact disc player or ask where he was from; no conversation occurred before Sanchez bumped into him. Nor did he or the juveniles flash gang signs to Sanchez from a car; they were waiting on the corner for John to arrive by car when the incident occurred. When Jose became aware that his brother had arrived and the juveniles were going to the car, Jose left Sanchez. He did not take Sanchez's hat and was not aware it was in the car until the police found it.

When Jose returned to the car, he said nothing about hitting Sanchez because John was doing him a favor by giving him a ride and he knew John would be upset if he learned he had been in a fight.

DISCUSSION

I

Sufficiency of the Evidence

Jose contends the evidence was insufficient to support his robbery conviction because it did not show a robbery but an assault, and it did not show he knew about a plan to rob Sanchez or was aware that a robbery had occurred. Therefore, John asserts, there was no substantial evidence to support a finding he aided and abetted a robbery.

" 'Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' (§ 211.) To be convicted of robbery, the perpetrator must intend to deprive the victim of the property permanently. [Citations.] Robbery requires the 'intent to steal . . . either before or during the commission of the act of force' [citation], because '[i]f [the] intent to steal arose after the victim was assaulted, the robbery element of stealing by force or fear is absent' [citation]." (*People v. Huggins* (2006) 38 Cal.4th 175, 214.) "There is no requirement that the victim be aware that his property is being taken from his presence by force or fear." (*People v. Jackson* (2005) 128 Cal.App.4th 1326, 1330-1331.) "The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165; *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 223.)

" 'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' (Pen. Code, § 31 . . . .) Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.) "To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, italics omitted.)

"A person may aid and abet a criminal offense without having agreed to do so prior to the act. [Citations.] In fact, it is not necessary that the primary actor expressly communicate his criminal purpose to the defendant since that purpose may be apparent from the circumstances." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531-532.) "Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime, although these are factors the jury may consider in assessing a defendant's criminal responsibility. [Citation.] Likewise, knowledge of another's criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime." (*Id.* at pp. 529-530.)

When an appellant challenges the sufficiency of the evidence to support a conviction, "we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Jennings* (1991) 53 Cal.3d 334, 364.) We " ' "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Davis* (1995) 10 Cal.4th 463, 509; *In re Manuel G.* (1997) 16 Cal.4th 805, 822.) We draw all reasonable inferences in support of the judgment. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.)

(A) Jose's Robbery Conviction

Basically, Jose argues the evidence showed an assault and battery and not a robbery. To support his argument, he points to evidence that Sanchez told the police "some guys just jumped [him]" rather than reporting he had been robbed and that the police officer who initially contacted Sanchez put out a call for an assault rather than a robbery. He also points out that Sanchez admitted that neither his watch nor compact disc player were taken, he had not previously mentioned his earrings were taken, there were no signs the earrings had been forcibly removed, and the earrings were never found. Additionally, Jose places significance on Sanchez's failure to mention at the preliminary hearing and juvenile trial that his hat had been demanded. Jose also points out that since Sanchez did not know when his hat was taken, it was possible it could have fallen off during the altercation and was only later picked up by Jose or the juveniles. Jose asserts this scenario would not constitute a robbery. Jose's argument ignores other evidence supporting the judgment and is unpersuasive.

Sanchez testified that prior to the assault, Jose demanded his watch, wallet and his hat and reached into his pocket to grab his compact disc player. The jury was entitled to believe Sanchez's testimony and to believe that any failure by Sanchez at the earlier hearings to mention the demand for the hat was merely an oversight. Further, even if the jury had doubts about whether Jose had specifically demanded the hat, it does not necessarily follow that no robbery occurred. Regardless of whether Jose or the others specifically demanded Sanchez's hat or his earrings, there was substantial evidence showing a demand for property, the use of force against Sanchez when he refused to turn it over and the taking of his property.

That Sanchez did not know whether the hat was snatched off his head or picked up from the ground is unimportant. The entire incident occurred over a short period, with the use of force and taking of property involving only a matter of seconds.[3] Substantial evidence supports a finding Jose and the juveniles confronted and attacked Sanchez with the intent to take property, used force to do so and by the use of force were able to obtain Sanchez's hat — whether taken from his head or the ground. The failure to take all the property demanded also does not lead to a conclusion a robbery did not occur. Sanchez testified that shortly after a van drove by, Jose and the others ran back to the car. A

3 Sanchez testified it lasted about 15 seconds. Jose testified it lasted about 5 to 10 seconds.

reasonable inference can be drawn that Sanchez's watch, wallet, and compact disc player were not taken only because Jose and the juveniles were interrupted by the presence of the van. Similarly, the fact that there were no signs the earrings were forcibly removed and were not later recovered does not negate a finding Jose participated in a robbery of other property from Sanchez.

In sum, there was substantial evidence to support the jury's verdict Jose was guilty of robbery by taking Sanchez's hat from his person or immediate presence by the use of force and with an intent to permanently deprive him of it.

(B) John's Robbery Conviction

John asserts there was no evidence showing he knew of a plan to rob Sanchez or saw or heard the robbery while it was occurring.

While there may have been no direct evidence, for example, of a conversation between John and the others in the car discussing the robbery plan or the results of the robbery, such direct evidence is not required to support a conviction. "Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) A conviction based on aiding and abetting a robbery, like other offenses, may be based on circumstantial evidence.

Here, the evidence showed John slowly drove by Sanchez as the others in the car leaned out the car's windows and displayed gang signs at Sanchez. Shortly thereafter, he parked the car and waited while Jose and the others confronted Sanchez. The confrontation occurred only a short distance behind the car, and it was not silent — Jose and the juveniles demanded to know Sanchez's gang affiliation, demanded property and punched him. When Jose and the others returned, they had Sanchez's hat, which was later found on the back seat of the car. Only after the others were in the car, did John start driving away from the scene. This evidence was more than sufficient to support a reasonable inference that John was aware that Jose and the others intended to engage in criminal activity, a robbery, and that John encouraged and facilitated the crime by stopping the car, waiting for their return and then driving them away.

II

Prosecutorial Misconduct

John and Jose contend the prosecutor committed two instances of misconduct: (1) during cross-examination by asking Jose whether he had bragged about punching Sanchez when he returned to the car and (2) during closing argument by pointing out that the defense had not called Carlos or Carlos's mother as witnesses to corroborate Jose's story.

" '[A] prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury.' " (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) A defendant is not required to show the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor's conduct is evaluated using an objective standard. (*People v. Price* (1991) 1 Cal.4th 324, 447.) "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*Ibid.*; *People v. Bradford, supra,* 15 Cal.4th at p. 1333.)

The defendant bears the burden of demonstrating the misconduct was prejudicial. (*People v. Williams* (1997) 16 Cal.4th 153, 255.) "To be prejudicial, prosecutorial misconduct must bear a reasonable possibility of influencing the . . . verdict. [Citations.] In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019; *People v. Jackson* (1996) 13 Cal.4th 1164, 1240.)

(A) Cross-Examination

The prosecutor, while cross-examining Jose, asked if he had bragged about the "good punch" he threw at Sanchez when he was in the car. Jose said he did not discuss it. He did not want his brother to know about it because his brother was doing him a favor by giving him a ride and would be angry if he knew Jose had gotten into a fight. Jose contends this question was an improper attempt to insinuate the truth of facts in his question, that is, that he had bragged about punching Sanchez in front of his brother.

Jose neither objected to the question nor requested the jury be admonished and therefore he failed to preserve the issue for appeal. This is not a situation where an admonition would not have cured any potential harm. Further, the jury was clearly instructed not to assume that any insinuation suggested by a question to a witness was true and was told that questions were not evidence. (CALJIC No. 1.02) We must presume the jury followed those instructions. (See *People v. Holt* (1997) 15 Cal.4th 619, 662.) Additionally, Jose admitted he had punched Sanchez and there was no evidence contradicting his assertion that he had not mentioned punching Sanchez when he returned to the car. Finally, we note other evidence supported an inference that John, even without being told about the punching, would have been well aware of the confrontation since he could have watched and heard it himself from his position in the car.

(B) Closing Argument

During closing argument, the prosecutor argued:

> "And if Jose's testimony is the truth, then he was not in that car. He was somewhere else at the time. He was over here with Carlos and Carlos's mom.
>
> "Now, there was a failure to call logical witnesses in this case. Why? If Jose Jimenez has an alibi that puts him out of that car, that car that has damning evidence of his guilt and of his brother's guilt, why didn't we hear from Carlos?"

Jose's counsel objected, claiming it was "burden shifting." The court overruled the objection, ruling a failure to call logical witnesses constituted fair comment. The prosecutor then argued:

> "Why didn't we hear from Carlos'[s] mom who was right there? They know where she lives. Why? We didn't hear from them, ladies and gentlemen, because this tale from Jose Jimenez was fabricated. . . ."

Jose asserts this argument by the prosecutor "shift[ed] the burden of proof." Noting that the defense has no duty or burden to produce evidence, Jose argues the prosecutor's argument improperly suggested the defense had an obligation to call any witnesses.

We find no error. It is well established that a prosecutor does not commit misconduct by pointing to "a defendant's failure 'to introduce material evidence or to call logical witnesses.' " (*People v. Wash* (1993) 6 Cal.4th 215, 263; *People v. Fierro* (1991) 1 Cal.4th 173, 213; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1051.) Carlos or his mother would have been logical witnesses to call to corroborate Jose's testimony that he had just left Carlos's apartment and was waiting for a ride from his brother.

Contrary to Jose's argument, the prosecutor's remark was only a comment on a weakness in the defense case and it did not suggest the defense had the burden of proving innocence or that the defense had the burden of corroborating Jose's testimony. (See *People v. Frye* (1998) 18 Cal.4th 894, 972-973 [rejecting argument that comment during closing argument on defense failure to call a witness resulted in shifting the burden of proof].) Moreover, the jury here was fully instructed on the prosecution's burden of proof (CALJIC No. 2.90) and we must presume it followed these instructions. (See *People v. Holt, supra,* 15 Cal.4th 619, 662; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.)

III

Response to Jury Note

During deliberations, the jury asked, "Are we allowed to draw inferences from the lack of a witness testifying?" John's counsel proposed the court should merely direct the jury to CALJIC Nos. 2.60 (no inferences should be drawn from a defendant's failure to testify), 2.61 (a defendant may rely on the state of the evidence) and 2.11 (neither side is required to call all possible witnesses), and tell the jury that if these instructions did not provide an answer to be more specific in its request. John's counsel suggested that only if the jury returned with a more specific request, should the court give additional instructions. Jose's counsel asked the court to instruct the jury that the burden of proof never shifts to the defense and to reinstruct the jury with CALJIC Nos. 2.11 and 2.60.

The court instructed the jury as follows:

> "You must not draw any inference from the fact that a defendant does not testify. You must neither discuss this matter nor permit it to enter into your deliberations in any way. (Please refer to CALJIC 2.60 in its entirety).
>
> "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond an[y] reasonable doubt every essential element of the charge against him. (Please refer to CALJIC 2.61 in its entirety).
>
> "Regarding witnesses other than either defendant, neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of the events. (Please refer to CALJIC 2.11 in its entirety). However, you may draw whatever reasonable inferences you feel logically flow from the fact that either side failed to call a logical witness."

The trial court has a duty to instruct the jury on general principles of law that are closely and openly connected with the evidence and necessary to the jury's understanding of the case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) If, during deliberations, the jury asks for information on a point of law, the trial court must attempt "to clear up any instructional confusion expressed by the jury." (*People v. Gonzalez* (1990) 51 Cal.3d

1179, 1212; § 1138.[4]) "A jury's request for reinstruction or clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration. Why has the jury focused on this issue? Does it indicate the jurors by-and-large understand the applicable law or perhaps it suggests a source of confusion? If confusion is indicated, is it simply unfamiliarity with legal terms or is it more basically a misunderstanding of an important legal concept?" (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) The court's duty to clarify jury confusion in response to a jury note " 'does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.' " (*People v. Giardino* (2000) 82 Cal.App.4th 454, 465.)

When we evaluate the correctness of the instructions given to the jury, we look at all the instructions, not merely a single instruction or a part of that instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248; *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) We will not reverse based on an instructional error unless there is a reasonable and not merely theoretical possibility that the instructional error affected the outcome of

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4 Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

the trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Blakeley* (2000) 23 Cal.4th 82, 94.)

Here, the court, when presented with the jury note, attempted to discern the source of the jury's question, observing that the question could have referred to Jose's failure to call witnesses, could have referred to John's failure to testify, or could have referred to the prosecutor's failure to call additional witnesses. Neither John nor Jose dispute that the source of the jury's question was unclear.

Nor does John or Jose contend the court's response to the jury's question involved any misstatements of law. Below, Jose argued that the jury should also have been instructed the burden of proof does not shift to the defendant based on a theory that telling the jury it can draw inferences from the failure to call logical witnesses results in improperly shifting the burden of proof to the defense. As we pointed out in part II, such an inference does not involve any improper shifting of the burden of proof. Accordingly, such instructions were not necessary in the court's response to the jury's note. Further, the jury here was fully instructed on the prosecution's burden of proof and nothing in the court's response to the jury's note undermined those instructions.

John argues supplemental instructions should have been given but does not specify what those instructions should have been. In his reply brief, he asserts that by referring the jury to CALJIC No. 2.60, which tells the jury no inferences can be drawn from a defendant's decision not to testify, the court "focused the jury on appellant's exercising his right not to testify, and simultaneously and erroneously suggested that this was the *only* non-testifying potential witness entitled to no adverse inference." John did not raise this issue below. Indeed, below, he specifically urged the court to refer the jury to this instruction. Thus, we could find that even if there were error, John invited the error and therefore cannot now complain on appeal. (See *People v. Wader* (1993) 5 Cal.4th 610, 657; *People v. Lucero* (2000) 23 Cal.4th 692, 723-724.) Moreover, as we have already pointed out, the jury was entitled to draw adverse inferences from the failure to call logical witnesses (other than a defendant).

IV

Denial of New Trial Motion

John and Jose moved for a new trial on the basis of newly discovered evidence, that is, that Sanchez had expected an economic benefit from testifying at trial. The court held a hearing on the new trial motion where Sanchez, defense attorney Timothy Scott, and district attorney investigator Alex Garcia testified.

Sanchez explained that prior to trial he had been contacted by Garcia who told him about a relocation program, and Sanchez did not pay much attention to him. Sanchez remembered Garcia gave him a brochure, which he did not read. The conversation occurred after Sanchez had received some threats connected with the trial of the two juveniles. Later, Sanchez asked Garcia about help finding a job but Garcia said they could not provide any job assistance. By the time he testified in this case, Sanchez had already moved. He did not receive any money from the district attorney's office for being a witness in the case. When he testified, he did not expect the district attorney's office to help him move, and after trial he was only interested in getting more information about the program.

A few weeks after the trial, Sanchez saw Scott at a shopping mall and asked Scott about the outcome of the trial. After Scott told him both defendants were convicted, Sanchez asked for the district attorney's phone number. Scott responded by repeatedly asking why Sanchez wanted the phone number. Sanchez told him he wanted (after the trial) to find out more information about a program that had been offered to him. Scott asked about what kind of program it was and what benefits were available. Sanchez said he did not really know. He may have told Scott that the program might help him get back on his feet and provide help with moving. He never used the phrase "economic benefits" when talking with Scott.

Scott's version of the meeting with Sanchez was slightly different. Scott testified that when he asked Sanchez why he wanted the prosecutor's phone number, Sanchez said, "I want to follow up on my, you know, benefits" and when Scott asked what kind of benefits, Sanchez answered, "You know, like my economic benefits." Sanchez said he thought the program would provide help relocating, finding a job or getting back on his feet because he had been a witness.

Garcia testified that he discussed with Sanchez threats that had been made against Sanchez and prepared a threat assessment report.[5] (threat assessment report was never shown) He told Sanchez the district attorney's office could provide help with relocating. About a month after the trial, Sanchez called him asking for help with getting a job and Garcia told him he did not do that.

so why did Sanchez approached Timothy about "economical" benefits

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5 The court conducted an in camera review of the threat assessment report prepared by Garcia and found it contained no discoverable material.

Question 22

The court found that the defense could have uncovered the information before trial had it exercised reasonable diligence since Scott was aware of the threats against Sanchez before trial and it was general knowledge that witnesses who are threatened may receive protection, including relocation assistance. The court also noted that relocation assistance is akin to other common types of witness assistance, such as the availability of restitution or offering reimbursement for mileage, matters which defense counsel conceded were not the type of inducement that had to be disclosed before trial by the prosecution as material exculpatory evidence.

So why he asked again for relocation

The court found Sanchez was a credible witness who had not paid attention to Garcia's offer of relocation assistance because he had already moved. The court noted Sanchez had a "limited vocabulary" and thus apparently found it unlikely he had used the phrase "economic benefits" as asserted by Scott. The court found there was no evidence that Sanchez felt pressured to testify in any particular way. The court observed Sanchez had testified consistently at the juvenile and the preliminary hearings, which occurred months before the offer of relocation assistance and had given the same story to the police immediately after the incident. Finally, the court noted that impeaching Sanchez with the offer of relocation assistance was "a double-edge sword" since it would lead to testimony about how Sanchez had been threatened by gang members on several occasions and had testified despite his fear.

Section 1181, subdivision (8) authorizes a new trial based on newly discovered evidence that is material to the defense and with reasonable diligence could not have been discovered and obtained before trial. "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

We will reverse only if the court's denial of a motion for a new trial constituted a clear abuse of discretion. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 473-474; *People v. Callahan* (2004) 124 Cal.App.4th 198, 209-210.) "The appellant has the burden to demonstrate that the trial court's decision was 'irrational or arbitrary,' or that it was not ' "grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." [Citation.]' " (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

The defense was aware of the threats and could have discovered the information before trial; relocation assistance is not uncommon in gang-related cases. The assistance was not offered in exchange for testimony and it was not dependent on Sanchez testifying at trial. (Contrast *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 44-46 [leniency offered in exchange for testimony].) The evidence was not reasonably likely to result in different verdicts. The proposed impeachment involved a minor, collateral matter. Defendants argue it could show Sanchez had some bias or motive to testify favorably to the prosecution's case. Any such motive, however, was undercut by Sanchez not paying much attention to the relocation offer when it was made, he had moved before trial and he, in fact, never received any benefits. It was also undercut by his trial testimony, which was fundamentally consistent with the information he gave the police before any offers of assistance were made. Moreover, introduction of the evidence would have resulted in placing before the jury detrimental information about gang-related threats made in connection with the juvenile case. Thus the evidence could have, or more likely would have, resulted in impeaching Jose rather than Sanchez.

Under these circumstances, we find no abuse of discretion in the trial court's decision to deny a new trial.

DISPOSITION

The judgments are affirmed.

McConnell

McCONNELL, P. J.

WE CONCUR:

Nares

NARES, J.

Aaron

AARON, J.

GROUNDS FOR RELIEF

22. **State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground.** (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE**: Conviction should be reversed because the evidence was insufficient as a matter of law to prove that petitioner aided and abetted in the robbery of Danny Sanchez and therefore the guilty verdict violates the due process clause of the united states constitution.

Supporting FACTS:

Print Copy is attached – Mark 22(a)

Did you raise GROUND ONE in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): petition for review

(2) Case number or citation: Court of Appeal No. D047639 Super. ct. No SCD 187538 Supreme Court No. (not provided on my petition for review)

(3) Result (attach a copy of the court's opinion or order if available): ________

GROUND ONE AND SUPPORTING FACTS Question 22-(a)

ARGUMENT
I

WHETHER THE CONVICTION SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT PETITIONER AIDED AND ABETTED IN THE ROBBERY OF DANNY SANCHEZ AND THEREFORE THE GUILTY VERDICT VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The prosecution's theory was that petitioner was guilty of robbery as an aider and abettor. The prosecutor argued petitioner aided and abetted: 1) *no evidence by starting the whole series of events when he slowed the car as others [v. gesticulate v.- use gestures instead of or in addition to speech 2.- express w/gestures] gestured at Sanchez, and 2) by acting as the getaway driver. (See e.g., 2RT 293 [prosecutor's closing argument].) The prosecution, however, failed to present any substantial evidence that petitioner aided and abetted the robbery. Nothing in the record made it any more likely that petitioner knew or did not know of the unlawful purpose of the robbers. Accordingly, the evidence was insufficient as a matter of law to affirm the true finding of the hate crime enhancement, which therefore should have been reversed.

There was no piece of evidence, or combination of evidence, that made it any more likely that petitioner aided and abetted the robbery than that petitioner simply provided his brother and his friends with transportation. Petitioner agrees with respondent that petitioner's conduct before and after the robbery is relevant. (See e.g., People v. Cooper (1991)

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53 Cal.3d 1158, 1164.) Petitioner parked and waited for his brother and his brother's friends. The car's lights were out, which made sense. It was dark out. (1RT 30.) Having the lights out might have been significant *if* petitioner had kept the car engine running, but there was no evidence he had. Thus, it made perfect sense for petitioner to park the car, turn the car and the lights off, and wait for his brother and friends *since there was no evidence petitioner knew beforehand what they were doing or how long they would be.*

After the robbery, petitioner's actions after the robbery similarly made it no more likely that petitioner had intentionally aided in a getaway than that petitioner simply continued to provide transportation innocently. When leaving the scene, he did not peel away, or speed. While evidence suggested petitioner delayed in pulling over. The reasonable inference from the evidence at trial, however, was that it was Sergeant Lamour who delayed stopping petitioner. (1RT 139.) When the officer did effect the stop, petitioner complied. (1RT 139.) The "loot" found in the car was Sanchez's baseball cap. It was found in the backseat of the car (1RT 191) where commonsense dictates the front seat driver, at night, never would have known it was there. The prosecution presented no evidence the cap was visible from the driver's vantage point.

The critical inquiry upon a challenge to the sufficiency of the evidence to support a criminal conviction is whether the record, when read in a light most favorable to the judgment, contains substantial evidence from which a trier of fact could reasonably have found defendant guilty of the crime beyond a reasonable doubt. (People v. Ferrara (1988) 202 Cal.App.3d 201, 207; Jackson v. Virginia (1970) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560]; People v. Silva (1988) 45 Cal.3d 604, 625.) "Substantial evidence" is evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined. (See People v. Lucero (1988) 44 Cal.3d 1006, 1020; People v. Conner (1983) 34 Cal.3d 141, 149.) Reasonableness is ultimately the standard underlying the substantial evidence rule. (People v. Reilly (1970) 3 Cal.3d 421, 425.)

Although not required to find that the evidence proves guilt beyond a reasonable doubt, an appellate court must determine whether any reasonable trier of fact could have found, upon the evidence presented, each essential element of the crime "beyond a reasonable doubt." While all presumptions on appeal favor the proper exercise of the trier of fact's power to judge witness credibility, resolve conflicts, weigh the evidence and draw

(14)

appropriate reasonable inferences, the trial court's findings can be upheld only if supported by substantial evidence. (See People v. James (1977) 19 Cal.3d 99; see also People v. Poggi (1988) 45 Cal.3d 306, 325 [reviewing court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence"].)

The substantial evidence rule necessarily mandates consideration of the weight of the evidence considered by the trier of fact in determining whether it is sufficient. (People v. Bassett (1968) 69 Cal.2d 122, 139.) The prosecution may -- as it did here -- ultimately rely on "circumstantial" rather than "direct" evidence to connect the defendant with the commission of the crime and prove guilt beyond a reasonable doubt. (People v. Huber (1986) 181 Cal.App.3d 601, 624.) Reliance on circumstantial evidence is often inevitable. (People v. Bloom (1989) 48 Cal.3d 1194, 1208, citing In re Tony C. (1978) 21 Cal.3d 888, 900 and People v. Moore (1957) 48 Cal.2d 541, 547.) Nevertheless, the substantial evidence standard applies in reviewing the trier of fact's resolution of conflicting inferences from circumstantial evidence. (People v. Elwood (1988) 199 Cal.App.3d 1365, 1372-1373; see also, People v. Bloom, supra, 48 Cal.3d at p. 1208, citing People v. Towler (1982) 31 Cal.3d 105, 118 ["whether the evidence presented at trial is direct or circumstantial the relevant inquiry on appeal

Thesaurus: Synonyms: 1. detailed, particular precise 2 b. accidental, incidental, indirect, unimportant, provisional. given in full detail 2-a. depending on circumstances b. adventitious ^ accidental remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt"].) Insubstantial circumstantial evidence offered in support of an inference of guilt is accordingly insufficient. (People v. Williams (1971) 5 Cal.3d 211, 215-217.)

Criminal liability attaches "upon all persons 'concerned' in the commission of a crime." (People v. Nguyen (1993) 21 Cal.App.4th 518, 529.) A "concerned" person is "guilty as an aider and abettor if, with the requisite state of mind, that person in any way, directly or indirectly, aided the actual perpetrator by acts or encouraged the perpetrator by words or gestures." (Id. at p. 529.) Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime. Similarly, knowledge of another's criminal purpose is not sufficient for aiding and abetting liability. Instead, the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime. (Id. at pp. 529-530; see also In re Michael T. (1978) 84 Cal.App.3d 907; 909-911 [insufficient evidence to find minor aided and abetted murder from fact that he was found at scene of crime and exclaimed, "We got his ass"].)

"The elements of robbery [1] are: (1) a taking (2) of personal property (3) in the possession of another (4) from [his] person or immediate presence (5) against [his] will (6) accomplished by means of force or fear (7) with an intent to permanently deprive." (People v. Prieto (1993) 15 Cal.App.4th 210, 213.) In order to convict an individual on a theory that he aided and abetted a robbery, the prosecution must prove beyond a reasonable doubt that the alleged aider and abettor acted "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (People v. Beeman (1984) 35 Cal.3d 547, 560.)

Pinizzotto v. Superior Court (1968) 257 Cal.App.2d 582, presented a factual situation similar to the instant case. In Pinizzotto, a police officer was staking out a residential area for a man wearing a white t-shirt, when a "car drove into the area and pulled to a stop." Two occupants of the car got out and ran out "through a pedestrian passageway which led to a restaurant." (Id. at p. 585.) A few seconds later, a man wearing a white t-shirt, subsequently identified as Paul Forster, ran back towards the car. (Id. at pp. 585-586.) "The officer turned up the lights of the police car and drove forward, whereupon Forster looked in the direction of the police car

1 Footnote in original text omitted in quote.

and then took an object from his right front pocket and threw it into a nearby area covered with ivy." (Id. at p. 586.) Forster stopped when the police officer honked the horn. (Ibid.) Meanwhile, Pinizzotto, the driver, and his passenger remained in the car waiting for Forster. (Ibid.) The police later searched the ivy and discovered "a piece of filmlike plastic material containing green leafy material that resembled marijuana." (Ibid.)

The Court of Appeal held insufficient evidence supported the magistrate's holding order that Pinizotto aided and abetted Forster with the possession of the drug. (Id. at p. 589.)

In this case, there was no evidence that petitioner had knowledge of his co-defendant's "criminal actions." There was no evidence that petitioner followed co-appellant or otherwise act as a lookout. There was no evidence that petitioner knew co-appellant was planning to commit a robbery. There was no evidence that petitioner either saw or heard the robbery. The fact that petitioner's car was near the scene of the crime did not mean that appellant knew his co-appellant had planned to rob or had robbed Sanchez. Moreover, the fact that petitioner drove his co-appellant from the scene did not establish that he learned about the crime after his co-appellant got into the car such that he could be find liable on a theory that he was transporting co-appellant to a place of safety. (See Argument II, post.)

There was absolutely no evidence of any type of communication between the petitioner and co-appellant – either before, during or after the robbery. There was no evidence that petitioner somehow learned a robbery had just occurred. (See People v. Cooper (1991) 53 Cal.3d 1158, 1161 ["Therefore, a getaway driver who has no prior knowledge of a robbery, but who forms the intent to aid in carrying away the loot during such asportation, may properly be found liable as an aider and abettor of the robbery"].)

Moreover, when petitioner drove away, he did not race away from the scene of robbery. (1RT 152.) While it is true that petitioner initially drove away without the headlights on, that signifies nothing. He did not speed away. From time to time, many drivers initially forget to turn on their headlights. What is significant is that when he was stopped he cooperated with the officer. (1RT 161.) Further, petitioner gave consent for police to search his car. (1RT 186.) While Sanchez's ball cap was found on the back seat of petitioner's car, there was no evidence petitioner knew it was there, or knew it belonged to Sanchez. The hat was not readily visible even to the officer who searched the car. (1RT 146.) Just because petitioner might

no evidence / Lamours statement is contradictory.

have been waiting in his car for the co-appellant was not, by itself, sufficient to impute aiding and abetting liability. (Cf., Pinizotto v. Superior Court, supra, 257 Cal.App.2d at p. 589.)

Further, even if petitioner learned of the robbery when co-appellant and his companions got into the car, petitioner's acts committed after the robbery were insufficient to establish aiding and abetting liability. (People v. Cooper (1991) 53 Cal.3d 1158, 1164 [Beeman "presupposes" requisite intent must be formed prior to or during commission of the offense]; People v. Haynes (1998) 61 Cal.App.4th 1282, 1293.)

The prosecution had a theory that petitioner was guilty as an aider and abettor. The theory was based on suspicion and speculation, not evidence. A reasonable inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." Rather, "[a] finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence. [Citations omitted.]" (People v. Morris (1988) 46 Cal.3d 1, 21, disapproved on other grounds in In re Sassounian (1995) 9 Cal.4th 535, 543 n. 5, 545 n. 6.) Suspicion "merely raises a possibility, and this is not a sufficient basis for an inference of fact." (People v. Blakeslee (1969) 2 Cal.App.3d 831, 837.)

(b) **GROUND TWO**: Whether the prosecutor engaged in prejudicial misconduct in cross-examination by asking co-defendant Jose Jimenez if he had not bragged about the crime in petitioner's presence immediately after its perpetration and before petitioner drove away...)

Supporting FACTS:

Print Copy is attached - Marked 22(b)

Did you raise GROUND TWO in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): petition for review

(2) Case number or citation: Court of Appeal No. D047639, Super-Ct. No. SCD187538 and Supreme court No. (not provided on my petition for review)

(3) Result (attach a copy of the court's opinion or order if available):

Copy attached Marked ~~22~~ Question 22

22 (b)

GROUND 2 AND SUPPORTING FACTS 22(b)

Ground 1 And Supporting facts 22(a)

Based on the foregoing, the jury's verdict is not supported by substantial evidence. If a guilty verdict is not supported by sufficient evidence, an appellate court must reverse the judgment and order a dismissal, since a retrial would constitute double jeopardy. (Jesse W. v. Superior Court (1979) 26 Cal.3d 41, 43-44; People v. Killebrew (2002) 103 Cal.App.4th 644, 661-662; Burks v. United States (1978) 437 U.S. 1, 11 [98 S.Ct. 2141, 57 L.Ed.2d 1].)

GROUND 2 AND SUPPORTING FACTS Question 22 (b)

II

WHETHER THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT IN CROSS-EXAMINATION BY ASKING CO-DEFENDANT JOSE JIMENEZ IF HE HAD NOT BRAGGED ABOUT THE CRIME IN PETITIONER'S PRESENCE IMMEDIATELY AFTER ITS PERPETRATION AND BEFORE PETITIONER DROVE AWAY WHEN THE PROSECUTOR HAD NO GOOD FAITH BELIEF THAT SUCH A CONVERSATION HAD OCCURRED THEREBY VIOLATING PETITIONER'S RIGHTS TO A FAIR TRIAL, TO CONFRONTATION AND TO DUE PROCESS.

The prosecutor committed prejudicial misconduct when cross-examining co-defendant Jose Jimenez by asking him about his getting into petitioner's car and bragging about punching the robbery victim. (See 1RT 231.) The rule is well established that a prosecutor cannot question a witness solely to imply or to insinuate the truth of the facts contained in the question. (See e.g. ; People v. Chatman (2006) 38 Cal.4th 344; in accord People v. Viscotti (1992) 2 Cal.4th 1, 52.)

Here, the prosecution presented no evidence that petitioner had knowledge of the robbery either before, during or after the incident. (See Argument I, ante.) Neither the prosecutor nor law enforcement was privy to the conversations within petitioner's car after the robbery. There was no evidence that any of the occupants in the car spoke to law enforcement or otherwise revealed any conversation that took place in the car at any time. The prosecutor posed the question without any good faith basis for doing so, without seeking an answer, and for the purpose of insinuating that Jose Jimenez had bragged. This imputed the otherwise missing knowledge element to petitioner.

The prosecutorial misconduct violated the federal Constitution when it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Donnelly v. DeChristoforo (1974) 416 U.S. 637; In re Hill (1998) 17 Cal.4th 800, 818; Olden v. Kentucky (1988) 488 U.S. 227, 231 [102 L.Ed.2d 513, 109 S.Ct. 480] [refusal to permit cross-examination of prosecution witness re motive to lie violated Sixth Amendment]; Chambers v. Mississippi (1973) 410 U.S. 284, 302 [35 L.Ed.2d 297, 93 S.Ct. 1038]; Crane v. Kentucky (1986) 476 U.S. 683, 690 [90 L.Ed.2d 636, 106 S.Ct. 2142]; LaJoie v. Thompson (9th Cir. 2000) 217 F.3d 663, 668.) Additionally, the improper cross-examination violated petitioner's Sixth Amendment right to confrontation. (People v. Barajas (1983) 145 Cal.App.3d 804, 810.)

When the prosecutor cross-examined the co-defendant, he asked:

Q: Now, as you got back in the car where your brother was, your cousin, and your cousin's friend, you bragged about the good punch you got into Danny Sanchez?

A: No, I wasn't – actually, we didn't discuss it because I was not wanting my brother to know about it because he was going to be mad about asking for a favor later. At first he didn't want to come pick me up. And then if he knew I just gotten into a fight he would even be madder at me.

Q: So you said nothing to anyone about the punch you just threw to Danny Sanchez, is that your testimony?

A: Yes.

Q: And the reason why you remained silent os to keep it from your brother John, correct?

A: Yes.

Q: You wanted him to know nothing about what you did?

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> A: Like I said, it was because he was going to be mad at me. Like I say, he is my older brother and – well.

(1RT 231.)

This issue is preserved for appeal. No objection or request for curative instruction is required to preserve this type of error on appeal. The "lack of contemporaneous objection is excused where the prosecutor asks questions and defense counsel assumes that the prosecutor was prepared to present evidence on the issue. [Citation.]" (People v. Pitts (1990) 223 Cal.App.3d 606, 692-693.)

Moreover, the general rule that a claim of prosecutorial misconduct will be deemed waived unless preserved by a specific trial objection is subject to a long-recognized exception that applies in this case. The exception involves a two-prong test. The first prong is met when the misconduct is so prejudicial that an admonition could not have cured the harm, then no objection is required. (People v. Green (1980) 27 Cal.3d 1, 34; see also People v. Johnson (1981) 121 Cal.App.3d 94; People v. Beach (1983) 147 Cal.App.3d 612.) The second prong is whether "the misconduct can be said to have contributed materially to the verdict in a closely balanced case or is of such a nature that it could not have been cured by a

22(b)

proper and timely admonition." (People v. McDaniel (1976) 16 Cal.3d 156, 176.)

Here, the prosecutor's improper question introduced the notion that the co-defendant had bragged to petitioner immediately after the crime, thereby imputing some knowledge and participation by petitioner. "You can't unring a bell." (People v. Hill (1998) 17 Cal.4th 800, 845, citing People v. Wein (1958) 5 Cal.2d 382, 423.) Thus, instruction about the prosecutor's improper cross-examination would have been inadequate and confusing for the jury. The improper cross-examination rendered the trial fundamentally and irreparably unfair. (C.f., People v. Jackson (1970) 3 Cal.App.3d 921, 931 [no instruction possible for judge's improper, partisan comments].) Moreover, such a serious and falsely misleading insinuation about the evidence had to have "contributed materially to the verdict." (People v. McDaniel, supra, 16 Cal.3d at p. 176.)

It is prosecutorial misconduct for a prosecutor to assert harmful facts through questioning that the prosecutor cannot prove. (People v. Warren (1988) 45 Cal.3d 471, 480; People v. Perez (1962) 58 Cal.2d 229, 240-241; People v. Lo Cigno (1961) 193 Cal.App.2d 360, 388.) This type of impermissible questioning is particularly harmful to a defendant when the content of the question suggests "that the prosecutor had a source of

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information unknown to [the jury] which corroborated the truth of the matters in question." (People v. Wagner (1975) 13 Cal.3d 612, 619.)

This Court has consistently reaffirmed the position it took in People v. Eli (1967) 66 Cal.2d 63, that: "Counsel must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions 'to waft an unwarranted innuendo in the jury box' [citation] . . .. There is also a responsibility on trial courts to scrupulously prevent cross-examination based on mere fantasy." (Id. at p. 79.) The Eli opinion concerned the dangers of cross-examination "based upon a paucity or total lack of factual support, which is asked with little or no hope of affirmative response and with the basic purpose of creating through innuendo that which cannot be established by proof." (People v. Ramos (1997) 15 Cal.4th 1133, 1173.)

More recently, in People v. Chatman, supra, this Court noted the prosecutor's have-you-heard questions to the defendant's character witnesses were proper only "so long as the prosecutor has a good faith belief that the acts actually occurred." (People v. Chatman, supra, 2006 DAR at 5469, citing People v. Payton (1992) 3 Cal.4th 1050, 1066-1067.) The Court disapproved of other questioning by the prosecutor where the questions were harmful on their face and were not intended to elicit an answer. (Id. at 5460.) The Chatman opinion explained:

> An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable. The prosecutor's question whether "the safe [was] lying" is an example. An inanimate object cannot "lie." Professor Wigmore has called cross-examination the "greatest legal engine ever invented for the discovery of truth." [Citation.] The engine should be allowed to run, but it cannot be allowed to run amok. An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all.

(Ibid.)

The prosecutor's cross-examination of Jose Jimenez was improper because: 1) it suggested the prosecutor had evidence of Jose Jimenez's conversation in petitioner's car, when there was no such evidence; 2) it impermissibly "waft[ed] an unwarranted innuendo in the jury box;" 3) there was no good faith basis for the cross-examination; and 4) it was never intended to elicit an evidentiary response.

The evidence was inconsistent about petitioner's presence at the scene before or during the robbery. While Sanchez testified petitioner's car drove by slowly just before the robbery, Jose Jimenez testified he and his two companions were on the street *before* petitioner arrived in his car. (Compare 1RT 34 with 1RT 206-213.) It cannot be determined from the verdict whether the jury accepted Sanchez's or Jimenez's account. There was no evidence at all of any pre- or post-offense communications between petitioner and the robbers. In short, the prosecution evidence linking petitioner to the crime was incredibly weak. (See Argument I, ante.) The prosecutor's cross-examination of Jose Jimenez clearly suggested that there was evidence Jose had bragged to petitioner about the crime, thereby impermissibly inferring an understanding between the brothers about the crime. But there was no such evidence.

Petitioner was prejudiced by the prosecutor's improper cross-examination. The question is whether it is "'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]" (People v. Welch (1999) 20 Cal.4th 701, 753.) When determining prejudice, it is proper to consider the record as a whole. (People v. Duncan (1991) 53 Cal.3d 955, 976-977.) In light of the paucity of evidence linking petitioner to the crime, the prosecutor's cross-examination was prejudicial. The cross-examination was a "deceptive or reprehensible method[] of persuasion." (People v. Samayoa (1997) 15

The only way to find out is a re-trial since it was premeditated misconduct o the D.A.'s s

(c) **GROUND THREE**: Wheter the court erred by failing to give proper supplemental instruction in response to jury's question wheter it could "draw inferences from the lack of a witness testifying" thereby violating petitioner's constitutional rights to trial by jury and due process

Supporting FACTS:

Print Copy is attached - Marked 22 (c)

Did you raise GROUND THREE in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): petition for review

(2) Case number or citation: Court of Appeal No. D047639, Super. Ct. No. SCD 187538 and Supreme court no. (not provided on my petition for review)

(3) Result (attach a copy of the court's opinion or order if available):

Copy is attached marked Question 22

GROUND 3 AND SUPPORTING FACTS 22(c)

Part of 22(b)

Cal.4th 795, 841.) Without the prosecutor's improper innuendo concerning an imaginary conversation between Jose Jimenez and petitioner, it is highly likely that the jury would not have found petitioner guilty beyond a reasonable doubt. Accordingly, the conviction should have been reversed.

III

WHETHER THE COURT ERRED BY FAILING TO GIVE PROPER SUPPLEMENTAL INSTRUCTION IN RESPONSE TO THE JURY'S QUESTION WHETHER IT COULD "DRAW INFERENCES FROM THE LACK OF A WITNESS TESTIFYING" THEREBY VIOLATING PETITIONER'S CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS.

During trial, the jury asked the court: "Are we allowed to draw inferences from the lack of a witness testifying?" (1CT 91.) In response to the jury's question, and over defense counsel's objection (2RT 363), the judge essentially re-instructed the jury with CALJIC Numbers 2.60. 2.61 and 2.11, which had already be given. (1CT 92.) The court was required to do more than merely repeat its initial instructions. Moreover, as petitioner will explain, the court's response was inadequate under the facts and circumstances of this case. The failure to instruct the jury in response to its question violated petitioner's state and federal rights to a jury trial and to due process. (Sullivan v. Louisiana (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; United States v. Gaudin (1995) 515 U.S.

506, 510 [132 L.Ed.2d 444; 115 S.Ct. 2310]; People v. Flood (1998) 18 Cal.4th 470.)

The trial judge's role as the jury's source of legal knowledge is critical to the trial process. This is never more true than when the jury questions a certain meaning of the law that is relevant because of the facts in a particular case. Appellate courts repeatedly underscore the vital role of the trial court in providing supplemental instruction to the jury. (People v. Thompkins (1987) 195 Cal.App.3d 244, 250.)

Thus, a specific jury request for re-instruction should alert the trial court to supplement its original instructions; not simply repeat them. Further, Penal Code section 1138 "imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury." (People v. Beardslee (1991) 53 Cal.3d 68, 96-97.) While the precise nature of any amplification, clarification or rereading of instructions is a matter of judicial discretion, "there are necessarily limits on that discretion." (United States v. Bolden (D.C. Cir. 1975) 514 Fed.2d 1301, 1308) "When the jury makes a specific difficulty known ... [a]nd when the difficulty involved is an issue . . . central to the case . . . helpful response is mandatory." (Price v. Glosson Motor Lines (1975) 509 F.2d 1033, 1037.)

At a minimum, the court must inquire into the jurors' confusion and seek to identify the source of the question. (See McDowell v. Calderon (9th Cir. 1997) 130 F3d 833, 839; People v. Thompkins, supra, 195 Cal.App.3d at p. 250; Powell v. United States (9th Cir. 1965) 347 Fed. 2d 156, 157.) Thereafter, the reinstruction or amplification should be fully sufficient to eliminate the confusion.

It is error to rely on original instruction where jury expressed confusion. (United States v. Gordon (9th Cir. 1988) 844 Fed.2d 1397, 1401-1402.) A cursory response which does not clarify the confusion is insufficient. (People v. Thompkins, supra, 195 Cal.App.3d at p. 250; see also United States v. Petersen (9th Cir. 1975) 513 Fed.2d 1133, 1136 [giving cursory supplemental instruction in face of jury confusion was insufficient].) A "perfunctory rereading" of the general instructions which were previously given is insufficient. (United States v. Bolden, supra, 514 Fed.2d at pp. 1308-1309.) One Circuit Court of Appeals has held a supplemental instruction, in response to a jury's question about the law, should do more than simply recite instructions that have previously been given. (United States v. Giacalone (6th Cir. 1978) 588 Fed.2d 1158, cert. denied 441 U.S. 944.)

Here, the jury's question to the court was: "Are we allowed to draw inferences from the lack of a witness testifying?" (1CT 91.) The court referred the jury to three pattern instructions it originally gave, that is, CALJIC Numbers 2.60,[2] 2.61[3] and 2.11.[4] (1CT 92.) The court's response was ineffective, non-responsive and a failure of the court's duty to instruct.

Here, the jury's question should have alerted the judge to the jury's fundamental misunderstanding of the original instructions. The question itself demonstrated the jurors did not understand the CALJIC instructions the court previously gave, which were the very same instructions to which the court referred in answering the jury's question.

As the trial judge recognized, "we don't really know what factually is behind the jury's question." (2RT 359.) Petitioner acknowledges that the prosecutor argued Jose Jimenez failed to call Carlos, an alibi witness. (2RT 340.) But that argument was not necessarily the genesis of the jury's question. For example, Sanchez testified about a van that drove by 10 to 15 seconds before the robbery altercation ended. (1RT 56-58.) The jury might

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2 CALJIC No. 2.60 instructed the jury no inference of guilt could be drawn from a defendant not testifying. (1CT 66.)

3 CALJIC No. 2.62 instructed the jury that the People had the burden of proof and a defendant may choose to rely on the state of the evidence. (1CT 67.)

4 CALJIC No. 2.11 instructed the jury that neither side is required to call witnesses who may have been present. (1CT 57.)

have wondered why the driver, and or occupants of the van, did not testify. Similarly, the jury might have wondered why petitioner did not call witnesses to establish that he received a phone call from his brother for a ride at or around the time of the robbery. Certainly, the evidence suggested there were logical witnesses that could have provided evidence for the defense. As defense counsel pointed out, the prosecution's theory was there was a coverup going on with co-defendant Jose Jimenez covering for petitioner. (2RT 352.)

Here, the record shows the jury did not understand the court's original instructions. (See, e.g., Shafer v. South Carolina (2001) 532 U.S. 36 [149 L.Ed.2d 178; 121 S.Ct. 1263, 1273]; Simmons v. South Carolina (1994) 512 U.S. 154, 178 [129 L.Ed.2d 133; 114 S.Ct. 2187]; Bollenbach v. United States (1946) 326 U.S. 607, 612 [90 L.Ed.2d 350; 66 S.Ct. 402] "The jury's question[] . . . clearly indicated that the jurors were confused." (Ibid; in accord Belmontes v. Woodford (9th Cir. 2003) 350 F.3d 861,903, fn. 19.) The fact that the court's initial use of pattern instruction CALJIC Numbers 2.60, 2.61 and 2.11 was proper did not cure the court's failure to supplement its original instructions upon a jury request to do so. (Johnson v. Gibson (10th Cir. 2001) 254 F.3d 1155, 1166.) Thus, under any standard

(d) **GROUND FOUR**: Wheter the court erred in denying petitioner's motion for new trial based upon the newly discovered evidence that the key prosecution witness believed he would receive monetary and other benefits in return for his testimony against petitioner.

Supporting FACTS:

Print ~~Copp~~ Copy is attached - Marked 22 (d)

Print Copy attached

Marked 22 (d)

Did you raise GROUND FOUR in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): petition for review

(2) Case number or citation: Court of Appeal No. D047639, Super. Ct. No. SCD187538 and Supreme court no. (not provided on my petition for review)

(3) Result (attach a copy of the court's opinion or order if available):

Copy attached, marked Question 22

GROUND 4 AND SUPPORTING 22(d)
FACTS 22(d)

Part of 22(c)

of review, the trial court's failure to supplement its original instructions properly was reversible error.

IV

WHETHER THE COURT ERRED IN DENYING PETITIONER'S MOTION FOR NEW TRIAL BASED UPON THE NEWLY DISCOVERED EVIDENCE THAT THE KEY PROSECUTION WITNESS BELIEVED HE WOULD RECEIVE MONETARY AND OTHER BENEFITS IN RETURN FOR HIS TESTIMONY AGAINST PETITIONER.

On November 4, 2005, petitioner filed a motion for new trial based, in part, on the newly discovered evidence that Sanchez believed he would receive monetary and/or other compensation as a result of his testifying as a prosecution witness against petitioner. (1CT 155-167.) On December 2, 2005, the court conducted a hearing on the motion and denied it. (5RT 632-644.) The court determined the evidence did not impact Sanchez's credibility (5RT 640), and that if the information had been disclosed and utilized by the defense at trial it was not reasonably probable that the outcome would have been different (5RT 642.)

The error in this case violated petitioner's rights guaranteed under the Sixth and Fourteenth Amendments. The constitutional guarantee of "'a meaningful opportunity to present a complete defense'" is grounded in the due process clause of the Fourteenth Amendment and the compulsory process or confrontation clauses of the Sixth Amendment. (Crane v. Kentucky (1986) 476 U.S. 683, 690 [90 L.Ed.2d 636, 106 S.Ct. 2142]; In re Martin, supra, 44 Cal.3d at p. 29.) This right includes the right to impeach witnesses at trial. (Chambers v. Mississippi, supra, 410 U.S. at p. 302.) The law is well established that a defendant has a right under the Sixth Amendment Confrontation Clause to admit evidence showing bias and a motive to make false accusations. (Delaware v. Van Arsdall (1986) 475 U.S. 673, 680-681 [106 S.Ct. 1431, 1435-1436, 89 L.Ed.2d 674] [restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment confrontation clause].)

Sanchez testified he believed he qualified for a "program" sponsored by the prosecution, which would provide him benefits. (4RT 490, 495-496.) He did not think his belief in this program related to how he had testified, or that he had been promised benefits in direct exchange for his testimony. (4RT 544-545.) Sanchez thought he qualified for funds to help him move and to help him out for a while, such as, with rent money. (4RT 502-503, 507-508.)

Co-defendant's trial attorney testified Sanchez approached him at a local shopping center, and asked for the prosecutor's phone number. (4RT 548-549.) Sanchez explained he wanted the number so he could follow up

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on the economical benefits under a program to relocate, employ and assist him because he was a witness at trial. (4RT 549-550, 558-559, 661-663.)

The prosecutor's investigator testified that he had no discussions with Sanchez about relocation, employment or other benefits. (4RT 577-578.) He discussed helping Sanchez move to avoid threats, but Sanchez already had moved. (4RT 584-585.)

Penal Code section 1181, subdivision (8), provides that a defendant may be granted a new trial when new evidence is discovered which is material to the defense, and which he could not have, with reasonable diligence, discovered and procured prior to trial.

The standard is "an objective one based on all the evidence, old and new, whether any second trier of fact, court or jury, would probably reach a different result." (People v. Huskins (1966) 245 Cal.App.2d 859, 862.) In ruling on a motion for a new trial, the trial court is required to independently weigh the evidence. (People v. Drake (1992) 6 Cal.App.4th 92, 98.) Deference is accorded to the trial court's findings "because of the trial judge's observation of the witnesses and superior opportunity to get `the feel' of the case." (People v. McSherry (1992) 11 Cal.App.4th 1157, 1167, citing People v. Hayes (1985) 172 Cal.App.3d 517, 524-525; see also People v. Shoals (1992) 8 Cal.App.4th 475, 488.)

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A defendant need not prove that there is no way the prosecution would have prevailed if the jury had received the newly discovered evidence. (In re Hall (1981) 30 Cal.3d 408, 423.) The newly discovered evidence need not be evidence which would lead to a defendant's acquittal. In Hayes, the appellate court held the defendant was entitled to a new trial because the newly discovered evidence would have likely affected the verdict. (People v. Hayes, supra, 172 Cal.App.3d at p. 525.)

In In re Hall, supra, 30 Cal.3d 408, 435, this Court granted a writ of habeas corpus based on newly discovered evidence because the key witnesses' new statements undermined the prosecution's entire case. In Hall, only two witnesses identified the defendant at trial, placed him at the scene or implicated him as the gunman. (Id. at pp. 414, 417.) After trial, both witnesses, brothers to the victim, recanted their testimony. (Id. at p. 417.) As a result, the Court found that the recantations qualified as newly discovered evidence and granted the writ. (Id. at p. 435.)

As in Hall, the new evidence here undermined the prosecution's case. Sanchez was the key prosecution witness. Without his testimony, the prosecution had no case. In this regard, petitioner notes that whether or not a "program" of benefits existed to benefit Sanchez is irrelevant. adj. not relevant syn. inappropriate, beside the question

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What is relevant was Sanchez's belief that such a program existed. The only reasonable inference from the evidence was that Sanchez believed he was qualified for benefits under a program. Moreover, his belief in those benefits was important enough to him that *he approached Jose Jimenez's defense counsel* at a shopping center to follow up on receiving those benefits. (4RT 548-549.)

No witness is entitled to a false aura of veracity. (People v. Beagle (1976) 6 Cal.3d 441, 453.) But that is what Sanchez enjoyed. There is no question that defense counsel would have utilized the evidence to attack Sanchez's credibility at trial – if they had known about it. (See e.g., 1CT 158 [defense counsel's hypothetical cross-examination of Sanchez]; 1CT 167 [co-appellant's counsel's declaration].)

Evidence of Sanchez's belief he qualified for some economic or other benefit relating to his testimony was *classic* evidence directly relating to his credibility. Evidence Code section 780 explains matters that a trier of fact properly may consider in determining the credibility of a witness. (Evid. Code, § 780.) A witness' bias, interest, motive and attitude toward the case all bear on credibility. (Evid. Code, § 780, subd. (f) and subd. (j).) Permissible impeachment so obviously includes areas of potential bias that the United States Supreme Court has held that such evidence is relevant

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even though there is no express provision in the Federal Rules of Evidence permitting the admission of bias as credibility evidence. (United States v. Abel (1984) 469 U.S. 45, 48[83 L.Ed.2d 450, 105 S.Ct. 465].)

The credibility evidence against Sanchez suggested innocence or reduced culpability. (Cf., In re Clark (1993) 5 Cal.4th 750, 766; In re Weber (1974) 11 Cal.3d 703, 724.) The requirement that new evidence "point unerringly to innocence" is not a hyper-technical requirement. "It does not require that each piece of prosecution evidence be specifically refuted." (Hall, supra, at p. 423.) Additionally, appellant need not meet the "impossible burden" of proving that no conceivable basis exists on which the prosecution might have succeeded. (Ibid.) The Hall opinion clearly stated such a requirement "would be unconscionable." (Ibid.) Rather, petitioner need show only that the impeachment evidence would have raised a reasonable doubt. The Ninth Circuit Court of Appeals held that where, as here, a substantial portion of the prosecution's case depended on the credibility of one prosecution witness, evidence which served to discredit the testimony of that witness may raise a reasonable doubt in the minds of the jurors. (Lewis v. Mayle (9th Cir. 2004) 391 F3d 989, 999.)

Based on the foregoing, the court erred in denying the motion for new trial and the judgment should have been reversed.

23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?
☐ Yes ☒ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: ____

(b) Case Number: ____

(c) Date action filed: ____

(d) Nature of proceeding: ____

(e) Name(s) of judges (if known): ____

(f) Grounds raised: ____

(g) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☐ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Mr. Jeffrey J. Larrimore; 7825 Fay Ave., Ste 200; La Jolla, CA 92037

(b) At arraignment and plea: Mr. Jeffrey J. Larrimore; 7825 Fay Ave., Suite 200; La Jolla, CA 92037

(c) At trial: Mr. Jeffrey J. Larrimore; 7825 Fay Ave., Suite 200; La Jolla, CA 92037 and Mr. Timothy Scott (Address unknown)

(d) At sentencing: Mr. Jeffrey J. Larrimore; 7825 Fay Ave., Suite 200; La Jolla, CA 92037

(e) On appeal: Susan K. Keiser; 3453 Ingraham Street, #85; San Diego, CA 92109-6713

(f) In any post-conviction proceeding: Susan Keiser; 3453 Ingraham Street #85; San Diego CA 92109

(g) On appeal from any adverse ruling in a post-conviction proceeding: Susan Keiser; 3453 Ingraham Street #85; San Diego CA 92109

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
☐ Yes ☒ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

____

(b) Give date and length of the future sentence: ______________________________

____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
☐ Yes ☐ No

28. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to proceed before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

☐ Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

☒ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

29. Date you are mailing (or handing to a correctional officer) this Petition to this court: 06-27-2008

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

06-27-2008 (DATE)

[signature] SIGNATURE OF PETITIONER

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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	)	
Plaintiff and Respondent,	)	Court of Appeal
	)	No. D047639
v.	)	
	)	
JOHN EDWARDS JIMENEZ, et al.,	)	Super. Ct. No.
	)	SCD187538
Defendants and Appellants.	)	
	)	
	)	

APPELLANT'S PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

PETITION OF APPELLANT FOR REVIEW TO EXHAUST STATE REMEDIES AFTER THE UNPUBLISHED DECISION BY THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE, IN CASE NUMBER D047639, AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF SAN DIEGO COUNTY.

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner John Edwards Jimenez respectfully petitions this Court for review to exhaust his state remedies, pursuant to California Rules of Court, SUPREME COURT NO. _______________

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Court of Appeal
	) No. D047639
v.	)
	)
JOHN EDWARDS JIMENEZ, et al.,	) Super. Ct. No.
	) SCD187538
Defendants and Appellants.	)
	)
______________________________________	)

APPELLANT'S PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

Susan K. Keiser
State Bar No. 115762
3453 Ingraham St., #85
San Diego, CA 92109
(858) 273-7108

Attorney for Petitioner
John Edwards Jimenez

Letter showing that my state appeal remedies are exhausted

SUSAN K. KEISER

ATTORNEY AT LAW

3453 Ingraham Street, #85
San Diego, California, 92109-6713
Telephone (858) 273-7108 ◆ Facsimile (858) 273-7109

December 14, 2007

Mr. John Edwards Jimenez
F06755; C-3-224 low
PO Box 921
Imperial, CA 92251

RE: People v. Jimenez; Appeal No. D047639; Superior Court No. SCD187538

Dear Mr. Jimenez:

I write in response to your letter postmarked November 27, 2007, to try to answer the questions you posed. As I wrote you in my October 5, 2007, letter, my appointment to represent you terminated as of the date of the Court's denial and I am no longer authorized to act on your behalf in this matter. So, the answer to your one question is: no, I no longer represent you in this matter. Your state appeal remedies are exhausted. This means the only avenue for further action in this matter is to file a petition in federal district court. You must either do this on your own or hire an attorney to do it for you. You are not entitled to appointed counsel. As I told you, the deadline for filing any petition is one year, plus 90 days from the date of the California Supreme Court's denial of your petition for review.

You requested "addresses of courthouses, legal research, etc." I am not sure what you are requesting. The state courts relevant to your appeal are listed on the proofs of service in the briefing I filed in your case. This will be the last page of the green and tan covered briefs. The federal district court where you could file a petition is the court for the Southern District of California, the address is: 880 Front Street, Room 4290 San Diego, CA 92101-8900. Your institution likely has some law library available for your use. Additionally, the briefing filed in your state appeal contains relevant legal authority for your case. The authorities appear in a table at the front of each brief and are cited throughout the brief.

I hope I have answered your questions.

Sincerely,

SUSAN K. KEISER

SKK/dbs

~~Enclosures~~

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is: Susan K. Keiser, Attorney at Law, 3453 Ingraham St., #85, San Diego, CA 92109.

On July 16, 2007, I served the foregoing document described as:

APPELLANT JOHN JIMENEZ'S PETITION FOR REVIEW

on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Clerk, California Supreme Court
350 McAllister St.
San Francisco, CA 94102

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Fourth Appellate District
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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Diego, California.

Executed on July 16, 2007, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

SUSAN K. KEISER

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rule 8.508 regarding the unpublished decision of the Court of Appeal, Fourth Appellate District, Division One, in Appeal No. D047639, affirming the judgment of the San Diego County Superior Court in Superior Court Case No. SCD187538. The case presents no grounds for review under California Rules of Court, rule 8.500(b), and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes.

STATEMENT OF THE CASE

An information filed on January 27, 2005, charged petitioner and his co-defendant, Jose Jimenez, with a single count alleging they committed second degree robbery in violation of Penal Code section 211. The information also alleged petitioner had suffered a prior strike conviction and a serious felony conviction within the meaning of Penal Code section 667, subdivisions (b) through (i), and subdivision (a), respectively. (1CT 1-4.)

On August 10, 2005, in a bifurcated trial, a jury convicted petitioner of robbery. (3RT 366-367.) On August 23, 2005, the court found the prior allegations true. (4RT 480-481.)

On November 4, 2005, petitioner moved for a new trial. (1CT 155-167.) On December 2, 2005, the court denied the motion. (1CT 242.)

On December 2, 2005, the court denied petitioner's motion to dismiss his strike. (5RT 654.) The court imposed the middle term of three years, doubled it to six years based on petitioner's strike, and imposed a five-year enhancement based on petitioner's prior serious felony conviction, for a total term of 11 years. The court additionally imposed a restitution fine of $200 pursuant to Penal Code section 1202.4, imposed but stayed a parole revocation fine of $200 pursuant to Penal Code section 1202.45, and imposed victim restitution in the amount of $61. (5RT 656; 1CT 192-193.)

On December 7, 2005, petitioner timely filed a notice of appeal. (1CT 194.)

On June 18, 2007, the Court of Appeal affirmed the judgement of the superior court. (Attachment A.)

STATEMENT OF FACTS

Petitioner adopts the statement of facts from the Court of Appeal opinion at pages two through four. (Attachment A, pp. 2-4.)

CONCLUSION

Petitioner respectfully submits the foregoing for review to exhaust state remedies arising from the above issues.

DATED: July 10, 2007

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CERTIFICATE OF WORD COUNT APPELLATE COUNSEL
PURSUANT TO RULE 8.504(D) CALIFORNIA RULES OF COURT

I, SUSAN K. KEISER, appointed counsel for John Edwards Jimenez, hereby certify that I prepared the foregoing Petition for Review on behalf of my client. I calculated the word count for the petition in the word-processing program Corel WordPerfect 12. The word count for the petition is 6,754, or less, including footnotes, but not including the cover, tables or attachments. The petition therefore complies with the rule, which limits the word count to 8,400. I certify that I prepared this brief in the word-processing program Corel WordPerfect 12 and this is the word count WordPerfect generated for this petition.

Dated: July 10, 2007

SUSAN K. KEISER

Attachment B